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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GUSTAVO E. PADRON, Defendant and Appellant.	B210525 (Los Angeles County Super. Ct. No. BA334083)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anne H. Egerton, Judge. Affirmed in part, reversed and remanded in part.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Gustavo Padron was found guilty of the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), driving without a license (Veh. Code, § 12500, subd. (a)), and hit-and-run driving (Veh. Code, § 20002, subd. (a)). On appeal, his sole contention is that the trial court erred in finding he failed to demonstrate "good cause" in support of his *Pitchess* motion.[1] He claims the error requires an unconditional reversal of the judgment. We agree that the trial court erred, but follow the recent mandate of our Supreme Court in *People v. Gaines* (2009) 46 Cal.4th 172 (*Gaines*), and order a limited remand.

FACTS

In light of the sole issue presented on appeal, we briefly summarize the facts, viewing the record in the light most favorable to the judgment. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Prosecution Evidence

Los Angeles Police Officer Michael Romero was in a marked, black and white police vehicle driven by his partner, Officer Chavez, at approximately 2:00 a.m. on December 24, 2007, patrolling eastbound on 41st Place and Wadsworth Avenue when he noticed a gray Toyota pickup truck approaching them in the opposite direction. The cars crossed one another, and Officer Romero saw there were two male Hispanics in the truck; Padron was the driver. The officers made a U-turn to get the license plate number and run a check on the plate to see if the truck was stolen. As the officers began to follow the truck, Padron failed to stop at a stop sign on 41st Place and McKinley Avenue and began speeding. The officers pursued Padron and heard a crash as they made a left turn onto 40th Place.

The truck crashed into the gate in front of the bedroom of Stephanie Casillas's house on 40th Place. Immediately afterwards, Officer Romero and Casillas saw Padron and another Hispanic male running southbound on Grand Avenue away from the truck. Padron was taken into custody by Officer Romero. After a chase, Officer

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

Chavez took the other Hispanic male into custody. No one else was in the area at the time.

Padron did not have a driver's license on him when he was arrested and DMV records confirmed that Padron had not been issued a driver's license.

DMV records showed that Michael Granata was the registered owner of the truck. Granata said he parked his truck across the street from his home in Ventura the previous morning. He did not leave his keys in the truck, nor did he give anyone permission to drive his truck.

At the crash site, Officer Enrique Atilano inspected the truck. He found the engine still running, the steering column cracked, no key in the ignition, and a screwdriver on the passenger seat. In his opinion, the truck had been started using the screwdriver.

Defense Evidence

A friend of Padron, Maria Hurtado, lived on 49th Street and Broadway. Padron came over to her house at approximately 8:00 p.m. on December 23, 2007. Padron left her house on foot to buy beer between midnight and 1:00 a.m. on December 24, 2007. He never returned.

Trial and Sentencing

The People filed a three-count information charging Padron with (count 1) unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); (count 2) driving without a license (Veh. Code, § 12500, subd. (a); and (count 3) hit-and-run driving (Veh. Code, § 20002, subd. (a).)

Evidence was presented at a jury trial as set forth above and Padron was found guilty on all three counts. Imposition of sentence on count one was suspended and Padron was placed on three years probation, conditioned upon service of 270 days in Los Angeles County jail and 90 days of community service. On counts two and three, Padron was sentenced to 180 days in county jail for each count. The terms were ordered to run concurrently with count one.

Padron filed a timely notice of appeal.

DISCUSSION

I. Trial Court Improperly Denied Padron's *Pitchess* Motion Without An In Camera Hearing

Padron contends that the trial court abused its discretion in denying his *Pitchess* motion, which sought to discover the personnel records of Officers Romero and Chavez. More specifically, Padron claims that he demonstrated good cause and materiality as required by *Pitchess* and that an in camera review of the police officers records should have been granted. We agree.

A. *Pitchess* Motion Principles

The California Supreme Court's decision in *Pitchess* "established that a criminal defendant may 'compel discovery' of certain relevant information in the personnel files of police officers by making 'general allegations which establish some cause for discovery' of that information and by showing how it would support a defense to the charge against him." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019 (*Warrick*).) The statutory scheme codifying *Pitchess* is set forth in Evidence Code sections 1043 through 1047 and in Penal Code sections 832.5, 832.7, and 832.8. This statutory scheme requires a showing of "good cause" for discovery of the information and "materiality" of the information or records sought to the subject matter involved in the pending litigation. (Evid. Code, § 1043, subd. (b)(3); *People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) The moving party bears the burden of meeting the "relatively low threshold" of demonstrating that "good cause" and "materiality" has been shown. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

To show "good cause" in a declaration, a moving party must present a "specific factual scenario" establishing a "plausible factual foundation" for allegations of officer misconduct. (*City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at pp. 85-86.) Additionally, "a showing of good cause requires a defendant . . . to articulate how the discovery being sought would support [his] defense or how it would impeach the officer's version of events." (*Warrick*, *supra*, 35 Cal.4th at p. 1021.)

In *Warrick*, the court set forth a number of questions to ask when determining if "good cause" is shown: "Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial? If defense counsel's affidavit in support of the *Pitchess* motion adequately responds to these questions, and states 'upon reasonable belief that the governmental agency identified has the records or information from the records' [citation], then the defendant has shown good cause for discovery and in-chambers review of potentially relevant personnel records of the police officer accused of misconduct against the defendant." (*Warrick, supra*, 35 Cal.4th at p. 1027.)

When demonstrating the "materiality" of the information sought, the defendant "need only demonstrate that the scenario of alleged officer misconduct could or might have occurred" and the allegations need not be "reasonably probable or apparently credible." (*Warrick, supra*, 35 Cal.4th at pp. 1016, 1025-1026.) Moreover, "[t]he trial court does not determine whether a defendant's version of events, with or without corroborating collateral evidence, is persuasive—a task . . . tantamount to determining whether the defendant is probably innocent or probably guilty." (*Id.* at p. 1026.)

Trial courts are vested with broad discretion when ruling on motions to discover police officer records. (*People v. Memro* (1995) 11 Cal.4th 786, 832.) A ruling on a *Pitchess* motion will only be reversed if there is an abuse of discretion shown. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

If, on appeal, it is found that the trial court did in fact abuse its discretion in denying a *Pitchess* motion, it is now clear there is a specific remedy. In *Gaines, supra*, 46 Cal.4th 172, the California Supreme Court recently determined that "the proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera is not

outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand." (*Id.* at p. 180.) If, after reviewing the confidential material in chambers, it is found that the personnel records contain no relevant information, the court is to reinstate the judgment. (*Id.* at p. 181.) If, however, it is found on remand that discoverable information exists and should have been disclosed, the trial court must order disclosure of that information, allow the defendant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. (*Ibid.*) Further, the court clearly noted that "a finding that material evidence was wrongfully withheld under *Pitchess* does not invariably mean that a defendant's right to due process was denied" (*id.* at p. 183), and that in order for a withholding of evidence to amount to a violation of constitutional due process rights, the defendant must show that there is a reasonable probability that the result would have been different if the information had been given to the defense. (*Ibid.*)

B. Padron's *Pitchess* Showing

In support of his motion, Padron appended the police report and presented the declaration of his attorney made on information and belief. According to the police report, Officers Chavez and Romero were on uniform patrol on December 24, 2007, at approximately 2:05 a.m., providing extra police support in the area of 41st Place and Wadsworth Avenue because there was a spate of stolen vehicles in the area. The two officers saw Padron driving a Toyota pickup truck, with Carlos Parra in the passenger seat. The truck was heading westbound on 41st Place approaching Wadsworth Avenue. Such trucks were often stolen in the area, so the officers made a U-turn to follow it and run the license plate to see if it was stolen. The officers attempted to catch up to the truck but were unable to do so because it was speeding. The truck ran a stop sign at 41st Place and McKinley Avenue. The officers continued to follow the truck and eventually turned westbound on 40th Place, where they saw the truck going northbound on Grand Avenue from 40th Place. The officers heard a traffic collision and then saw Padron and Parra run southbound on Grand Avenue from 40th Place.

The two were taken into custody.

When other officers later looked inside the truck, they found the truck's steering column was cracked and though the engine was running, there was no key in the in the ignition. They later determined that the truck was stolen.

According to the police report, a civilian witness who lived near the accident site said she saw two Hispanics get out the truck and later saw police take those two male Hispanics into custody. The witness said she did not see any other suspects.

On information and belief, Padron's counsel declared: (1) Padron was never in the truck and was not driving it; (2) there were three individuals in the vehicle, not two; (3) the other persons, including the driver, fled the scene and were not arrested; (4) Padron was arrested because he was in the area where the other two fled; (5) the officers lied in their report when they said they saw Padron driving the truck and running from it, and they did so to cover up the fact that they were unable to arrest the suspects who fled; and (6) the officers intentionally chose not to have the civilian witness participate in a field lineup because she would not have identified Padron as one of the suspects.

At the *Pitchess* hearing, the prosecutor argued that Padron had failed to offer any explanation as to what he was doing in the area, and that Padron simply denied the truthfulness of the police report. The trial court found that Padron did not provide a plausible factual scenario for his allegations of officer misconduct and denied Padron's *Pitchess* motion.

C. Padron Showed "Good Cause" for an *In Camera* Review of the Police Officers' Personnel Records

Respondent claims that Padron did not provide a *plausible* factual scenario in support of his *Pitchess* motion and the trial court correctly denied the motion. In support of its position, Respondent relies on *People v. Thompson* (2006) 141 Cal.App.4th 1312 (*Thompson*). In *Thompson*, the court ruled that although the defendant's factual scenario presented in support of his *Pitchess* motion was certainly *possible*, it did not rise to the level of a *plausible* factual scenario. (*Thompson*, at

p. 1318.) Respondent claims that in this case, just as in *Thompson*, Padron has presented a *possible* factual scenario, but not one that is *plausible*. We disagree.

In *Thompson*, an undercover officer working as part of a narcotics "buy team" approached Thompson. Thompson asked the officer, "How much," and the officer said "A dime," meaning $10 worth of drugs. Thompson handed the officer two off-white solids which were later found to be cocaine base. The officer gave Thompson two $5 bills they had previously photocopied. A number of police officers were on hand, including two who monitored the conversation between Thompson and the purchasing undercover officer and several others who watched the transaction from 25 to 30 feet away. Uniformed police officers who were not part of the buy team came to the scene and arrested Thompson. They recovered the two $5 bills from his person, which were found to match the ones the buy officer had photocopied. (*Thompson, supra*, 141 Cal.App.4th at p. 1315.)

Thompson moved for *Pitchess* discovery and in his supporting declaration he claimed he did not offer or sell the drugs, the officers did not recover the buy money from him, and the officers made up the story when they realized he had a criminal history. They fabricated the story, Thompson claimed, in order to punish him for "being in the wrong area, at the wrong time and for having a prior criminal history. . . ." (*Thompson, supra*, 141 Cal.App.4th at p. 1317.)

Our colleagues in Division Six of this appellate district found that Thompson did not meet the "unquestionably low threshold" of demonstrating a plausible showing that might or could have occurred to require an in camera review of the police officer's records. (*Thompson, supra*, 141 Cal.App.4th at p. 1315.) They explained: "Thompson does not provide an alternate version of the facts regarding his presence and his actions prior to and at the time of his arrest. He does not explain the facts set forth in the police report. In essence, his declaration claims that the entire incident was fabricated and, by inference, that the police officers conspired to do so in advance. Thompson is not asserting that officer planted evidence and falsified a police report. He is asserting that, because he was standing at a particular location, 11 police officers

conspired to plant narcotics and recorded money in his possession, and to fabricate virtually all the events preceding and following his arrest." (*Id*. at p. 1318.)

Although we view this as a close case, given the low threshold required for discovery of such information, we hold the trial court should have ordered an in camera review of the two officers' personnel records. Here, Padron offered an alternative factual scenario that did not merely deny the facts asserted in the police report. Padron produced an affidavit in support of his *Pitchess* motion on the information and belief of his counsel stating that he was not in nor driving the truck when he was taken into custody. He claimed he happened to be in the area where the truck crashed and that he was mistakenly identified as one of the Hispanics in the truck. He asserted the police officers lied in their report to cover up the fact that they were unable to arrest the real suspects who successfully fled the scene. This factual scenario is at least plausible under the *Warrick* definition of one that might or could have happened.

Padron's factual scenario might not be persuasive or ultimately credible, but it is not like the *Thompson* case where defendant's denials "'might or could have occurred' [only] in the sense that virtually anything is possible." (*Thompson*, *supra*, 141 Cal.App.4th at p. 1318.) Here, Padron set forth a sufficient showing to meet the low threshold of good cause and an in camera hearing should have been conducted. Accordingly, the trial court abused its discretion in denying Padron's pretrial *Pitchess* motion.

D. Appropriate Remedy Is a Conditional Reversal and Remand

Although we agree with Padron that the trial court erred in denying his pretrial *Pitchess* motion, we do not agree that this requires an unconditional reversal. According to the Supreme Court's ruling in *Gaines*, the proper remedy when a trial court abuses its discretion in denying a pretrial *Pitchess* motion "is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand." (*Gaines*, *supra*, 46 Cal.4th at p. 180.) If, after reviewing the confidential material in chambers, it is found that the officers' personnel records

contain no relevant information, the court is to reinstate the judgment. (*Id.* at p. 181.) If, however, it is found on remand that discoverable information exists and should have been disclosed, the trial court must order disclosure of that information, allow the defendant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. Padron has the burden of demonstrating this reasonable probability. (*Ibid.*)

Padron requested the trial court to review the records for, "All complaints from any and all sources relating to acts of aggressive behavior, violence, excessive force, or attempted violence or excessive [*sic*], racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any another evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284 . . . ."

We strongly disapprove of such overbroad requests. A request for discovery of citizens' complaints must be tailored to the type of misconduct alleged. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.) Based on the allegations of misconduct here, the trial court need only review the officers' personnel records for fabrication, false arrest, dishonesty, and writing false reports. (*Ibid.*)

DISPOSITION

The judgment is reversed and remanded in part. The trial court is directed to conduct an in camera inspection of the requested peace officers' personnel records. If the trial court's inspection on remand reveals no relevant information, the trial court is directed to reinstate the judgment of conviction and sentence. If the inspection reveals relevant information, the trial court must order disclosure, allow Padron an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the

outcome would have been different had the information been disclosed. In all other respects, the judgment is affirmed.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.